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SERVICE DATE – LATE RELEASE SEPTEMBER 15, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-441 (Sub-No. 4X)

SAN PEDRO OPERATING COMPANY, LLC—ABANDONMENT EXEMPTION—
IN COCHISE COUNTY, AZ

Decided: September 15, 2005

By petition filed on June 6, 2005, San Pedro Railroad Operating Company, LLC (SPROC or petitioner), a wholly owned subsidiary of Arizona Rail Group, seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 76.2 miles of railroad line in Cochise County, AZ, as follows: (1) the Bisbee Branch, between milepost 1085.0 at Bisbee Junction and milepost 1090.6 at Bisbee, a distance of 5.6 miles; and (2) the Douglas Branch (a) between milepost 1097.3 near Paul Spur and milepost 1106.5 near Douglas, a distance of 9.2 miles, (b) between milepost 1055.8 near Charleston and milepost 1097.3 near Paul Spur, a distance of 41.5 miles, and (c) between milepost 1040.15 near Curtiss and milepost 1055.8 near Charleston, a distance of 19.9 miles.

Notice of the filing was served and published in the Federal Register on June 24, 2005 (70 FR 36696-97). Chemical Lime Company (Chemical Lime or shipper) timely filed a statement in opposition on July 14, 2005. In a decision served on July 28, 2005, the Board, through the Director of the Office of Proceedings, granted the motion of Sonora-Arizona International, LLC (Sonora) for an extension of time to late-file a reply to the petition. In the same decision, the Board granted SPROC's request to reply to the replies filed by Chemical Lime and Sonora, but cautioned SPROC to respond directly to issues raised and evidence presented in the reply statements, and not to submit evidence and argument that could have been submitted with its petition. On August 1, 2005, Sonora filed in opposition to SPROC's petition. SPROC filed replies to the statements of Chemical Lime (with numerous attachments) and Sonora on August 3, 2005, and August 4, 2005, respectively. On August 9, 2005, Chemical Lime filed a motion to strike portions of SPROC's reply for violating the Board's prior order and prejudicing Chemical Lime's interests. Petitioner filed a reply to that motion on August 15, 2005. Petitioner filed additional new evidence on September 8, 2005.

BACKGROUND

In its petition, SPROC states that it acquired the subject line from SWKR Operating Co. Inc. (SWKR) in 2003. See San Pedro Railroad Operating Company, LLC—Acquisition and Operation Exemption—SWKR Operating Co. Inc., STB Finance Docket No. 34430 (STB served Nov. 21, 2003). Petitioner further states that it acquired the line with the intent of restoring a connection with the Mexican rail system at Naco and hauling transborder “overhead” freight, but that this plan never materialized. SPROC states that it has carried coal and coke for Chemical Lime, the only on-line shipper, but that the level of traffic—96 carloads in 2004 and 155 carloads in 2005 through May 15—has been inadequate to sustain the railroad. According to petitioner, despite its efforts to attract traffic, it foresees no prospects for new traffic in the future. SPROC asserts that it has been working with Chemical Lime to build a transload facility along its line at Curtiss to allow the shipper to transload inbound coke to trucks for transportation to Chemical Lime’s plant at Paul Spur and for that reason did not anticipate any shipper opposition. Petitioner adds that the shipper plans to use trucks to transload and haul inbound coal from BNSF Railway Company at Deming, NM, to its plant.

SPROC calculates that it incurred a net operating loss of \$220,337 in 2004 (\$276,977 in expenses less \$56,640 in revenues), and a net operating gain of \$28,826 in the first three months of 2005 (\$39,989 in expenses against \$68,815 in revenues) to operate the line. Petitioner also estimates the line’s net liquidation value (NLV) at \$6 million and the opportunity cost of holding the line at \$840,000 for 2005. Finally, petitioner asserts that it would need to invest approximately \$600,000 in track, right-of-way, and bridge repairs to maintain the line in a minimally serviceable condition.

Chemical Lime, which produces lime from limestone, states that it receives coal and coke at its plant in Paul Spur (the Douglas plant) via petitioner’s Curtiss-to-Charleston and Charleston-to-Paul Spur rail segments. Chemical Lime does not object to SPROC’s proposal to abandon the Bisbee Branch and the portion of the Douglas Branch between Paul Spur and Douglas, neither of which is necessary to serve its plant. However, Chemical Lime explains that its costs would rise significantly if SPROC were to abandon its entire line. It states that it has invested significant funds in reliance on SPROC’s service, to reopen the Douglas plant (\$1.47 million) and to improve the SPROC tracks leading to its plant (\$54,618). Chemical Lime maintains that SPROC did not provide it with a proposal to build a transloading facility at Curtiss. Additionally, Chemical Lime argues that, after filing its petition, SPROC unilaterally ceased service on the line without any regulatory authorization. Finally, Chemical Lime points out that SPROC had a net operating gain for the first three months of 2005, before it ceased operating, and it argues that this gain could have been much greater for the full year had the petitioner not ceased operations. Without evidence that current revenues from the traffic on the

line are less than current operating costs, Chemical Lime argues that there is insufficient evidence upon which to allow the abandonment.

Sonora, an Arizona Limited Liability Corporation organized by Charles M. Sotelo, states that it opposes the proposed abandonment because it has pursued, developed, and is in the process of implementing significant business ventures directly dependent on continued rail service (intermodal transfer facility, deep sea port project, etc.) that could bring traffic to this line. Sonora adds that Mr. Sotelo has aggressively pursued development of intermodal traffic and supporting facilities for many years to establish a connection with the Mexican rail system at Naco. Sonora asserts that traffic opportunities exist for this line that, once implemented, will benefit the community. Finally, Sonora asserts that the significant opposition here renders this abandonment proposal inappropriate for the exemption process.

In rebuttal, SPROC states that it ceased operations over the line at the recommendation of the Federal Railroad Administration (FRA) due to the poor condition of the bridge at milepost 1044.4, at the northern end of the Douglas Branch. SPROC asserts that, because it promptly sought abandonment authority, its embargo and cessation of service are reasonable and lawful. Petitioner maintains that the Board routinely grants opposed abandonment exemption requests where the revenue from traffic is marginal compared to the cost of operating the line, as here. SPROC asserts that the increased shipping costs that Chemical Lime might face are not a basis for denying the abandonment, and that Chemical Lime knew or should have known the business risks of reopening its Douglas plant. In response to Chemical Lime's statement that it had never received a transload facility proposal, petitioner included with its rebuttal a copy of a letter sent to Chemical Lime after the shipper filed its opposition, discussing future transload possibilities. Petitioner also states that, although it is unsure whether its common carrier obligation has been reactivated over lines previously authorized for abandonment, it believes the line serving Chemical Lime is industrial track for which no abandonment authority is needed. Additionally, on the basis of 2004 and 2005 pro forma and consolidated financial statements and a bridge repair estimate introduced for the first time on rebuttal, petitioner claims that its 2004 and 2005 operating expenses substantially exceed its revenues. Finally, in its September 8, 2005 filing, petitioner submits additional photographic evidence and repair estimates regarding recent flood damage to portions of the line.

In response to the statement of Sonora, SPROC argues that the "business opportunities" described therein are too speculative to be entitled to any weight, and that previous attempts to establish a connection with the Mexican rail system at Naco have been unsuccessful.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval, based on our finding that the present or future public convenience and necessity require or permit the abandonment. Under 49 U.S.C. 10502, however, we exempt a transaction or service from otherwise applicable regulatory requirements or procedures when we find that: (1) those requirements or procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

This proceeding is subject to a deadline established by Congress. Under 49 U.S.C. 10904(c), an offer of financial assistance (OFA) is due 120 days after the filing of an abandonment application. The Board has, by rule, applied that time limit to abandonment exemption proceedings. See 49 CFR 1152.27(b)(2). Accordingly, we have established a deadline of no more than 110 days from date of petition filing to issue a decision on the merits. See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), aff'd, Nat'l Ass'n of Reversionary Prop. Owners v. STB, 158 F.3d 135 (D.C. Cir. 1998); 49 CFR 1152.27(b)(2). Furthermore, we have expressly provided that, in case of any conflict with the general exemption rules at 49 CFR part 1121, the special rules for petitions for abandonment exemption at 49 CFR part 1152 control. 49 CFR 1152.60(a). Thus, we must decide petitions for abandonment exemption expeditiously. Boston and Maine Corporation—Abandonment Exemption—In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 75X) et al., slip op. at 6 (STB served Dec. 31, 1996) (Boston and Maine); San Joaquin Valley Railroad Company—Abandonment Exemption—In Kings and Fresno Counties, CA, STB Docket No. AB-398 (Sub-No. 4X), slip op. at 4-5 (STB served Mar. 5, 1999); Gauley River Railroad, LLC—Abandonment and Discontinuance of Service—In Webster and Nicholas Counties, WV, STB Docket No. AB-559 (Sub-No. 1X) et al., slip op. at 2 n.3 (STB served June 16, 1999) (Gauley River); Soo Line Railroad Company—Abandonment Exemption—In Marshall and Roberts Counties, SD, STB Docket No. AB-57 (Sub-No. 48X), slip op. at 4 n.9 (STB served Nov. 17, 1999).

The exemption process is designed to minimize regulatory burdens. An exemption is appropriate only when we have sufficient information to reach an informed decision. Typically, the types of abandonment and discontinuance proposals that are authorized through the exemption process are those where shippers do not contest the abandonment or, if they do contest it, the revenues from the traffic on the line are clearly marginal compared to the costs of operating the line. See Boston and Maine, slip op. at 5-6; Tulare Valley Railroad Company—Abandonment and Discontinuance Exemption—In Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X), slip op. at 8 (STB served Feb. 21, 1997). Where there is an inadequate record on which to grant a petition for abandonment exemption, the petition will be denied. See Boston and Maine, slip op. at 6.

Whether abandonment authority is sought by application or petition, the railroad must demonstrate that the line in question is a burden on interstate commerce. Typically, in an attempt to make that showing, the carrier submits evidence to demonstrate that the costs it incurs exceed the revenues attributable to the line, and that keeping the line in service would impose a burden on it that outweighs the harm that would befall the shipping public and the adverse impacts on rural and community development, if the rail line were abandoned. See Gauley River, slip op. at 7.

In this proceeding, SPROC filed its petition knowing that we must meet the applicable time limits for abandonment cases and that our exemption procedures provide only for the filing of a petition and replies thereto. See The Burlington Northern and Santa Fe Railway Company—Abandonment of Chicago Area Trackage in Cook County, IL, STB Docket No. AB-6 (Sub-No. 382X) (STB served Sept. 21, 1999) (BNSF/Cook County). While SPROC presented some financial information in its petition, petitioner provided no workpapers or other underlying support for its revenue, cost, NLV, opportunity cost, or rehabilitation figures. The Board permitted petitioner to respond to the two replies in opposition, but SPROC was specifically cautioned not to submit evidence and argument that it could have submitted with its petition. In filing detailed financial statements and a bridge repair estimate for the first time on rebuttal, as well as additional new evidence in its September 8, 2005 filing, SPROC disregarded that limitation, and we will not consider that evidence here.

It would be unfair and improper to consider, let alone to grant the petition based on, this new evidence. Our decision must rest on solid financial data, readily available for review by affected parties. Tulare Valley Railroad Company—Abandonment and Discontinuance Exemption—In Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X), slip op. at 3 (STB served Mar. 6, 1998). SPROC knew that this abandonment proposal might be opposed and should have filed with its petition information sufficient to support its request for exemption. See 49 CFR 1121.3(a); BNSF/Cook County, slip op. at 6. It did not do so. The two protestants to this abandonment would be unfairly prejudiced if we were to consider petitioner's new evidence, because they have not had an opportunity to respond in this proceeding. And we are unable to solicit and consider a stream of new filings within the time frame for deciding these cases. See Gauley River, slip op. at 2 n.3. In the absence of additional evidence, we lack an adequate record on which to assess SPROC's proposal.

Denial of this petition is without prejudice to SPROC's refiling an appropriate abandonment application or a petition for exemption that contains all relevant evidence and financial data. (We note that SPROC must obtain a new docket number if it subsequently seeks abandonment authority for this line, as the docket number it has used here relates to a proceeding initiated by the prior owner of the line, SWKR.)

We reject SPROC's argument that this rail line is industrial track for which no abandonment authority is needed. Historically, this line has been operated as a regulated, common carrier line of railroad. SPROC filed a notice of exemption for authority to lease and operate the line as a common carrier in October 2003. When SPROC exercised that authority, it assumed the common carrier obligation that has historically attached to the line. See SierraPine—Lease and Operation Exemption—Sierra Pacific Industries, STB Finance Docket No. 33679, slip op. at 3 (STB served Nov. 27, 2001). Petitioner cannot now assert that the line constitutes industrial track and is therefore excepted from the licensing requirements of 49 U.S.C. 10901, or from the abandonment requirements of 49 U.S.C. 10903, by 49 U.S.C. 10906. Petitioner must therefore obtain authority from the Board if it wishes to abandon this line.

Finally, because we would not consider the new evidence even in the absence of a motion to strike, we will deny Chemical Lime's motion to strike as moot. Our denial of SPROC's petition for exemption also moots labor protection and environmental issues.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. SPROC's petition for exemption is denied without prejudice to its filing an application or a properly supported petition for exemption to abandon this line.
2. Chemical Lime's motion to strike is denied as moot.
3. This decision is effective on the date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary